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No. A-625

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

DENNIS JAMES PRING, ROBERT THOMAS ROUCH, PAUL HARFORD HIBBERT, MICHAEL Y. CORBETT, RODNEY DUANE JACKSON, THERESA MAYE WILLIAMS, VALERIE ELIZABETH ARRINGTON, ROYAL EDWARDS WATKINS, SCOTT THOMAS GUDMUNDSON,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
(United States of America, Real Party In Interest),
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

The several questions presented for review in this petition for certiorari revolve around a single core: May a defendant charged in a federal criminal case with trafficking in a controlled substance be precluded from challenging, as part of his defense, the administrative classification of that substance within a complex statutory scheme, where such classification determines whether he ultimately may be subject to a penalty ranging from a minimum of one year imprisonment and $5,000 fine to a maximum of fifteen years' imprisonment and $25,000 fine for each offense? For the first time since World War II (see *Yakus v. United States*, 321 U.S. 414 [1944]) this question is squarely presented to this Court by a district court's unequivocal refusal to hear or decide a criminal defendant's challenge to the merits of administrative action central to the criminal prosecution. The questions presented are:

1. Whether preclusion of a criminal defendant's challenge to administrative classification of a controlled substance violates the Due Process Clause of the Fifth Amendment, the Sixth Amendment's guarantees of the right to a fair trial, or the Cases and Controversies provision of Article III, Section 2 of the Federal Constitution.

2. Whether mandamus is the appropriate remedy to review a district court's refusal to hear or decide a defendant's challenge to the administrative classification of a controlled substance.

3. Whether dismissal of the indictment is the appropriate remedy where a defendant successfully challenges the administrative classification of a controlled substance.

PARTIES TO THE PROCEEDINGS BELOW

The petitioners are all defendants in three otherwise unrelated criminal prosecutions for trafficking in cocaine in the United States District Court for the Eastern District of California. Prior to trial, defendants brought essentially identical motions to challenge their indictment before three different judges of that Court. The motions were argued in consolidated hearings before the judges to whom the cases were assigned. After the three judges (hereinafter referred to as "the District Court") concluded, for the reasons discussed below, that they could not rule on the merits of petitioners' claims, petitioners sought interlocutory review in the United States Court of Appeals for the Ninth Circuit; in the alternative, petitioners asked that Court to exercise its mandamus power to order that defendants' claims be heard should it determine that interlocutory review was not available.

In two separate orders, the Court of Appeals granted the government's motion to dismiss the appeal, and denied petitioners' request for review by way of mandamus. Because petitioners do not seek review of the dismissal of their direct appeal, but rather seek review only of the appellate court's refusal to exercise its mandamus powers to order the district court to adjudicate their claims, the nominal Respondent in this action is the United States District Court for the Eastern District of California; the actual controversy exists, as it always has, between petitioners and the United States, and accordingly the United States of America is named as the Real Party in Interest.

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The petitioners, Dennis J. Pring, et al., respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, issued without opinion on December 4, 1981, denying petitioners' request that a writ of mandamus issue to the United States District Court for the Eastern District of California, compelling that court to adjudicate their claim that cocaine is misclassified as a Schedule II controlled substance within the meaning of the Controlled Substances Act, 21 U.S.C. § 812(b)(2).

OPINIONS BELOW

The District Court issued two unreported opinions which are reproduced in Appendices A and B, respectively. The appellate orders, issued without opinions, are denominated Appendix C and Appendix D.

JURISDICTION

The judgment of the Court of Appeals denying petitioners' request for mandamus was entered on December 4, 1981. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, Section 2 of the United States Constitution provides in pertinent part:

> "The Judicial power [of the United States] shall extend to all Cases, in Law, and Equity, arising under this Constitution [and] the laws of the United States . . .
>
> ". . .
>
> "The Trial of all Crimes . . . shall be by jury . . ."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment of the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

The All Writs Act, 28 U.S.C. § 1651, provides that:

> "The Supreme court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the uses and principles of law."

Various sections of the Controlled Substances Act (hereafter the "CSA") are necessarily involved in this action. The particular provisions most directly involved, which are set out in full in Appendix E, are portions of 21 U.S.C. §§ 802, 811, 812, 841, and 877.

STATEMENT OF THE CASE

On July 2, 1980, a federal grand jury sitting in the Eastern District of California returned three unrelated indictments charging petitioners and several other persons not parties to this action with conspiracy to distribute cocaine and with various substantive offenses of possession and sale of cocaine in violation of §§ 21 U.S.C. 846 and 21 U.S.C. 841(a)(1). After defendants in all three cases filed essentially identical motions challenging the classification of cocaine as a Schedule II controlled substance, (See 21 U.S.C. § 812[b][2], *infra*), the three judges accepted defendants' suggestion that the cases be consolidated for hearings on the motion to dismiss the indictment.

The need for this unusual but not unprecedented procedure of consolidated hearings arose from the fact that defendants' challenge to the classification of cocaine was directed not at the constitutionality of the Congressional legislation defining cocaine as a "narcotic" and placing it in Schedule II of the CSA; instead, defendants asserted, and the government never denied, that scientific developments since enactment of the CSA rendered continued classification of cocaine in Schedule II invalid if measured solely against the scientific criteria for classification set out in 21 U.S.C. § 812.[1] Further, defendants argued that when the scientific advances establishing cocaine's relative harmlessness (in medical and psychological terms) are evaluated in the light of the "new era" of administrative law which was first announced in *Citizen's To Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1970), which reached a dramatic watershed in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, ... U.S. ....., 100 S.Ct. 2844 (1980), the failure of the Administrator of the DEA to reclassify cocaine and thereby to substantially lessen the penalties associated with its use, possession, or sale, constitutes a violation of administrative due process of law for which the proper, indeed the only remedy was the dismissal of the indictment.

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[1]The government's sole substantive response to defendants' contentions was based on the legislative history of the CSA, which showed that Congress intended that the Attorney General (or his designee, the Administrator of the Drug Enforcement Agency) balance scientific criteria against "social policy and law enforcement criteria," see Appendix B-4, *infra;* and see 1970 U.S. Code Congressional Administrative News, at 4589.

When the District Court perceived that none of the many cases rejecting traditional constitutional challenges to the validity of the CSA or the initial placement of cocaine in Schedule II had ever considered the administrative due process arguments advanced by petitioners, it engaged in a lengthy and carefully considered effort to identify the legal principles and precedents to employ in filling a void left by ten years' development of essentially irrelevant authority. During this process the court identified two issues as fundamental to its task: first, since defendants' challenge to cocaine's current classification was based on administrative law principles, does the court in which a criminal prosecution is brought have jurisdiction to review whether the Administrator of the DEA has improperly failed to reclassify cocaine? Second, if the court has jurisdiction, and if it determines that cocaine may no longer be properly classified in Schedule II of the CSA, is dismissal of the indictments required?

In an order entered March 6, 1981 (Appendix A), the district court declined to reach the merits of petitioners' challenge to the classification of cocaine, on the ground that it lacked jurisdiction to review the validity, under principles of administrative law, of the retention of cocaine in Schedule II. In the court's view, the provision of an administrative review and appeal mechanism (see 21 U.S.C. § 877, Appendix E, *infra*) "expressly restricts review of the attorney-general's action or inaction to the United States Court of Appeals of the District of Columbia (or, in this instance, the Court of Appeals for the Ninth Circuit)." Petitioners' only remedy, the court continued, was to seek review of the classification of cocaine in a separate

administrative action, after which, if they prevailed, they might bring a collateral attack on their sentences pursuant to federal habeas corpus statutes (see 28 U.S.C. §§ 2255, 2241).

Petitioners immediately moved for reconsideration of the court's order and pointed out two fundamental errors that had led to the court's conclusion that it lacked jurisdiction over defendants' claims. First, petitioners pointed out that unlike other statutes providing for judicial review of administrative action outside a civil or criminal enforcement proceeding, the Controlled Substances Act contains no language precluding consideration of a challenge to the validity of administrative action in the enforcement proceeding. See, e.g., the Clean Air Act (42 U.S.C. § 7206[b]), the Noise Control Act (42 U.S.C. § 4915[a]), or the Water Pollution Control Act (33 U.S.C. § 1369[b]). Second, although this honorable court had never dealt directly with the question whether the "preclusive jurisdiction" doctrine of *Yakus v. United States, supra,* could be validly invoked in anything other than a war-time emergency situation, recent decisions by the court seem to indicate that when the question finally does arise, the answer will be no. See *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 289 (Powell, J., concurring), and *Harrison v. PPG Industries, Inc.,* ..... U.S. ....., 100 S.Ct. 1889, n.9 at 1897 (Stewart, J.); 1898-1899 (Powell, J., concurring) (1980).

On April 24, 1981, the court filed a Supplemental Order which altered the basis of its refusal to rule on the merits of defendants' classification challenge, but left the result intact. (See Appendix B.) In the second order the court

concluded that since the classification scheme of the CSA anticipates that both scientific evidence and policy considerations play a part in the classification of any particular drug, classification is "solely an administrative law issue" that plays no part in the prosecution of a criminal case.

As noted above, defendants timely filed notices of appeal in the United States Court of Appeals for the Ninth Circuit. In their brief on appeal, defendants urged that should the appellate court determine that interlocutory appeal of the order did not lie, the court exercise its power to treat the appeal as a petition for writ of mandamus. See *United States v. State of Wash.*, 573 F.2d 1121 (9th Cir. 1978); *Gladstein v. McLaughlin*, 230 F.2d 762 (9th Cir. 1955); *Cord v. Smith*, 338 F.2d 516, 521-522 (9th Cir. 1964). This petition follows from the court's order denying the request for exercise of mandamus power entered December 4, 1981.

BASIS FOR FEDERAL COURT JURISDICTION

Because this is a case brought by the government charging violations of federal criminal statutes, the district court has jurisdiction under 18 U.S.C. § 3231.

Petitioners argued below that the court of appeals had jurisdiction to review the refusal of the district court to adjudicate under the so-called "collateral order exception" to the final judgment rule codified in 28 U.S.C. § 1291. In the alternative, petitioners requested that the court of appeals exercise the mandamus power conferred by the All Writs Act, *supra*, 28 U.S.C. § 1651. Whether the court of appeals erred in refusing to issue the writ of mandamus prayed for is one of the issues presented by this petition.

REASONS FOR ALLOWANCE OF THE WRIT

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REASONS FOR GRANTING THE WRIT

1. Introduction and Summary of Argument

The refusal of the district court to adjudicate petitioners' challenge to cocaine's classification in the CSA, and the subsequent failure of the United States Court of Appeals for the Ninth Circuit to correct this refusal clearly meet the requirements of Supreme Court Rule 17.1(a) and (c) for review on certiorari, because under the most traditional view of the mandamus power of the federal appellate courts, such power should—indeed must—be employed when a federal court has refused to exercise jurisdiction over a matter properly brought before it.

To understand why the district court's abdication of jurisdiction violates the due process and fair trial guarantees of the Fifth and Sixth Amendments to the United States Constitution, as well as the Cases and Controversies Pro-

vision of Article III of our Constitution,[2] a brief overview of the structure and purpose of the CSA is required. Most important to note is that the Comprehensive Drug Abuse Prevention and Control Act was designed to deal in a coordinated fashion with a perceived drug problem in the United States by establishing rehabilitation programs relating to drug abuse (Title 1); by providing authority for the Department of Justice with respect to law enforcement aspects of drug abuse (Title 2); and by regulating the importation and exportation of drugs subject to abuse (Title 3). See *1970 U.S. Code Cong. & Ad. News* at 4568.

Central to the Act was the regime by which substances could be added, removed, or reclassified within controlled substance "schedules." The CSA contains five categories of controlled substances, designated as Schedules I-V; and the schedules are ranked on the basis of decreasing harmfulness at each level, measured against increasing benefits for the user. See 21 U.S.C. § 812(b) (1-5), *infra,* Appendix E. And see *e.g., NORML v. DEA,* 559 F.2d 735, 737 (D.C. Cir. 1977). Moreover, the regulatory controls and criminal penalties imposed on the manufacture, acquisition, and distribution of substances listed under the CSA vary enormously in proportion to the schedule in which the drug is placed.

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[2]The most lucid discussion of the Article III problem presented by the preclusive jurisdiction doctrine continues to be that of Professor Henry M. Hart in the celebrated "Dialogue" first written in 1953. See Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv.L.Rev. 1362, and reprinted in Hart & Wechsler, *The Federal Courts And The Federal System* (2nd ed. 1973), Page 330. See also Tribe, *American Constitutional Law* (1978), at Pages 37 and following.

Congress recognized that as scientific knowledge concerning the effects of various controlled substances improves, the initial drug classifications in the Act would have to be changed. Accordingly, it gave the Attorney General the power to change the schedules of controlled substances (see 21 U.S.C. § 811, *infra,* Appendix E). In order to assist the Attorney General in this task, the Congress authorized him to carry out educational and research programs to develop the information necessary to perform his rescheduling functions under Section 811 [see 21 U.S.C. § 872(a)(6)], and provided guidelines to him for use in determining into which schedule a controlled substance should be placed. See 21 U.S.C. § 811(c), *infra,* Appendix E, for a listing of the eight factors to be considered in determining the control decision.

The legislative history of the Controlled Substances Act, and particularly the testimony of then-Attorney General Mitchell and then-director of the Bureau of Narcotics and Dangerous Drugs (BNDD) Ingersoll, make clear that the theory and structure of the Controlled Substances Act was guided by three overriding principles: first, the creation of five tiers of controls (codified in the five schedules of 21 U.S.C. § 812) was designed to incure both *actual* fairness (in the sense that offenses and offenders of varying degrees of severity would be dealt with by means of graduated penalties) and the *appearance* of fairness (in the sense that judges, prosecutors, and the public would perceive that the penalty fits the crime in as many senses of that word as are possible). Second, the stress upon

scientific criteria and constant updating and republishing of the schedules are designed to insure that the classification and penalty structure was rational and credible, in the sense that the classification of drugs into one or more of the various schedules conformed to the best available scientific knowledge as to the relative harmfulness and benefit of such substance. Third, and in the eyes of the sponsors of the legislation, the most important feature of the CSA, was the granting of discretion to the Attorney General to move drugs between one schedule or another. (Section 811) As Mr. Ingersoll explained in his testimony introducing the Controlled Substances Act:

> Perhaps the greatest advantage to this approach is that drugs may be moved from one schedule to another as scientific information and law enforcement problems come to light . . . by giving the Attorney General this discretion, the Congress will permit a quick response to the ever-changing drug problem based upon relative harm and relative abuse potential of existing drugs and newly discovered drugs.
>
> Testimony of John Ingersoll at the *Hearing of the Subcommittee to Investigate Juvenile Delinquency on the Committee of the Judiciary, September 15, 1969,* at p. 214.

In this context, petitioners respectfully submit that the failure of the court to consider their challenge to the Administrator's abdication of his responsibility to reschedule cocaine if, as petitioners contend, scientific evidence wholly invalidates its current classification, violates the constitutional provisions just cited. If petitioners are correct, exercise of the appellate court's mandamus power

was justified, and indeed required, as we show immediately below.

2. The District Court's Abdication Of Jurisdiction Over A Central Element Of A Criminal Charge Entitled Petitioners To Mandamus Relief From The Court of Appeals, And Calls For Exercise Of This Court's Power Of Supervision

If petitioners' contention that the "imposing corrective mechanism"[3] of the CSA is central both to its validity as legislation and to the validity of the manner in which it is implemented, the question presented by the district court's refusal to entertain their challenge to the administration of the Act boils down to this: When, if ever, can a defendant in a criminal case be prevented from challenging the Administrator's failure to reclassify a controlled substance on the ground that scientific developments have rendered its present classification improper (and thus illegal) under the criteria set out in the Controlled Substances Act? The answer, petitioners respectfully submit, is never, or at least hardly ever—which leads directly and conveniently to the

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[3]The phrase is that of Judge Will of the Northern District of Illinois, sustaining the validity of the CSA against a traditional constitutional challenge on the ground that the provision for reclassification provides the "slender threads of minimal rationality" required by *United States v. Carolene Products Co.*, 304 U.S. 144, at 152-153 n.4 (1938). See *United States v. Castro*, 401 F.Supp. 120, at 127 (1975). Perhaps by coincidence, and perhaps not, the author of the *Castro* opinion is the same judge who was the prevailing party in two of the most prominent mandamus cases decided by this Court. See *Will v. United States*, 389 U.S. 90 (1967) and *Will v. Calvert Insurance Co.*, 437 U.S. 655 (1978).

discussion of why the court of appeals erred in not exercising its mandamus power to compel the district court to adjudicate petitioners' claims.

In this Court's most recent pronouncement on the circumstances justifying exercise of mandamus power, the Court noted that "our cases have answered the question as to the availability of mandamus in situations such as this with the refrain, 'What never? Well, *hardly* ever!'" *Allied Chemical Corp. v. Daiflon, Inc.*, ... U.S. ....., 101 S.Ct. 188, 190 (per curiam 1980). Petitioners recognize and accept the view that the remedy of mandamus is a drastic one, to be employed only in extraordinary situations. See *Will v. United States, supra,* 389 U.S. at 95. The Writ has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when its duty is to do so." *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26 (1943). And, while the federal courts "have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' . . . the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.'" *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 492 (1976), quoting *Will v. United States, supra.*

Although generalizations are fraught with danger in this treacherous and amorphous terrain—particularly generalizations offered by counsel rather than by a court—it seems safe to state that the classic or traditional use of

the mandamus power[4] does not compel a particular *result*, nor inquire into the substantive correctness of a lower court's actions nor "coerce the discretion of a subordinate tribunal." See *Ex parte Bradstreet*, 7 Pet. 634, 647 (1833) (district court ordered to reinstate and decide portion of a cause of action dismissed on grounds that no monetary relief could be awarded). Instead, this "old" form of mandamus merely lies to direct the court to "proceed to a final judgment or decree in a cause, in order that the [appellate court] may exercise the jurisdiction of review given by law." See *Knickerbocker Insurance Company v. Comstock*, 16 Wall. 258, 270 (1873) (circuit court ordered to reinstate and decide appeal dismissed for want of jurisdiction). This narrow scope and justification of traditional mandamus follows necessarily from the constricted rationale of the extraordinary writ power applied by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137 at 175 (1803):

> "To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. . . . It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted and does not create that cause."

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[4]As contrasted with so-called supervisory or advisory mandamus, see generally Note, "Supervisory And Advisory Mandamus Under The All Writs Act," 86 Harv.L.Rev. 595 (1973); and see *Parr v. United States*, 351 U.S. 513, 520 (1956), where this court noted that the "new" mandamus will lie even where "the most that could be claimed is that the district courts have *erred* in ruling on matters *within* their jurisdiction." (Emphasis added.)

Of course, confining the *purpose* of mandamus to the "aid of appellate jurisdiction" does not limit the Court's *power* to issue the writ to cases already on appeal; rather, the mandamus power,

> "extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise, the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." *Roche v. Evaporated Milk, supra,* 319 U.S. at 25.

In the instant case, therefore, the only question is whether the district court had the discretion to refuse to entertain petitioners' challenge to the classification of cocaine. That is, if petitioners show, as we submit they can, that they had a clear right to issuance of the writ, see *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, at 384 (1953), and, further, that they have no other adequate means to attain relief sought by the writ, see *Kerr v. United States Dist. Ct., supra,* 426 U.S. at 403, then the appellate court erred in failure to grant them the relief to which they were entitled.

That these requirements have been met in the instant case is easily seen by reference to the decision of the United States Court of Appeals for the Second Circuit in *United States v. Kiffer,* 477 F.2d 349 (1973). There, the appellate court, in the only decision known to counsel relating even remotely to the issue presented here, rejected the government's arguments that criminal defendants must exhaust administrative remedies even before bringing constitutional challenges to the validity of the Controlled

Substances Act. The Second Circuit dismissed the government's "estoppel" argument with the comment that "the administrative route for these appellants would at best provide an uncertain and indefinitely delayed remedy. Second, even assuming the existence of a viable administrative remedy, application of the exhaustion doctrine to criminal cases is generally not favored because of 'the severe burden' it imposes on defendants," citing *McKart v. United States*, 395 U.S. 185, 197 (1969).

Not surprisingly, no criminal case except *Yakus, supra*, has been found where any federal court has ever declined jurisdiction to rule on the merits of a crucial defense to the charges. Indeed, the closest case which could be found, *In re Simons*, 247 U.S. 231 (1918), demonstrates why mandamus must be available here if direct appeal is not.[5]

In *Simons*, the district judge had refused to entertain one count of a civil claim alleging a contract to make a will, on the ground that it was an equity action which could not be heard by a court of law. Instead, the court transferred that claim to the equity docket, and set the remaining damage claim for trial. Speaking for a unanimous

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[5]As noted in the Statement of the Case, petitioners perfected a direct interlocutory appeal of the district court's orders; thus, petitioners have avoided the fate of the petitioner in *Helstoski v. Meaner*, 442 U.S. 500 (1979), who failed to bring an interlocutory appeal and then was denied mandamus relief because this Court concluded at a later time that the harm he had suffered was subject to such an appeal ("The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it.* It lies only when there is practically *no other remedy.*" 442 U.S., at 505 [citing *Ex parte Rowland*, 104 U.S. 604, 617 (1882) (emphasis by the Court)]).

court, Mr. Justice Holmes inquired, first, whether New York law precluded equity issues from the jurisdiction of a law court. Finding that it did not, he quickly concluded that mandamus should issue:

> "If we are right, the order was wrong and deprived plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before plaintiff is put through the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake . . .
>
> "[*A*]*s the order may be regarded as having repudiated jurisdiction of the first count, mandamus must be adopted* to require the District Court to proceed and to give plaintiff her right to a trial at common law." *Id.* at 233 (emphasis added; citation omitted).

Finally, this Court's most recent discussion of the principles governing the exercise of mandamus in the traditional sense fully supports petitioners' request that it be employed here. In *Will v. Calvert Fire Ins. Co., supra,* the respondent insurance company sought and obtained mandamus to compel a federal court to adjudicate a civil case which had been stayed pending completion of essentially identical state proceedings. The Seventh Circuit agreed that the district court's failure to perform a duty fell within the ambit of the "traditional use" of mandamus. Four justices of this Court agreed; Justice Stewart thought mandamus premature; Justice Rehnquist, for a plurality of four, held that because modern federal law discouraged duplicate federal and state proceedings, mandamus would not lie:

> "Where a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Id.*, at 666 (citation omitted).

Calvert makes clear, therefore, that where traditional mandamus is sought to compel a duty wrongfully withheld, the litmus test is whether the court had discretion whether to act or not—which is precisely the test for issuance of the writ applied by the great chief justice 180 years ago. *Marbury v. Madison, supra,* 1 Cranch at 166-167. Which is also precisely the reason that if the Order below is not appealable, mandamus must lie, because:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for a violation of a vested legal right."

3. If Mandamus Relief Is Afforded Here, Established Canons For Exercise Of This Court's Supervisory Powers Justify A Determination Of Whether Dismissal Of An Indictment Is Legally Required Should Petitioners Prove That Cocaine Is Improperly Classified As A Schedule II Controlled Substance

In *Platt v. Minnesota Mining and Mfg. Co.*, 376 U.S. 290 (1964), this Court reversed (on writ of certiorari) the exercise of mandamus power by the Court of Appeals for the Seventh Circuit, on the ground that the appellate court had erred in substituting its own factual findings for that of the trial court in deciding whether change of venue should be had pursuant to Federal Rule of Criminal Procedure

21(b). After concluding that the mandamus power could be exercised only to determine the appropriate legal criteria to be applied by the trial court, this Court remanded the case with instructions that the appellate court vacate the district court's ruling, and remand the case to the lower court for reconsideration. In so doing, this honorable Court noted that "effective judicial administration" requires that it discuss the legal issues that necessarily will arise during reconsideration in the trial court. 376 U.S. at 245.

On the same rationale, and in light of the District Court's candidly expressed uncertainty as to what relief should be granted if petitioners' claims are sustained, petitioners request that this Court consider whether dismissal of an indictment is required if misclassification is proved. As they argued below, a determination by the trial court that the current classification of cocaine is improper would require dismissal of the indictment, because the proper classification would then be uncertain; and since the classification in turn determines the range of penalties to be imposed by the Court, prosecution under Section 841(b)(1)(A) would violate the most fundamental principle of Anglo-American criminal law: *nulla poena sin lege*—no punishment without law:

> "[A] crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime." LaFave and Scott, *Criminal Law* p. 8 (1972). See also H. Packer, *The Limits of the Criminal Sanction* (1968), P. 19; J. Hall, *General Principles of Criminal Law* (2d ed. 1960), P. 18; R. Perkins, *Perkins on Criminal Law* (2nd ed. 1969), Pp. 8-9.

The reason, indeed the necessity, for the rule that where the penalty is uncertain, no prosecution may be had, is a product of the reaction of colonial America to the excesses and oppressions effected by the King's judges during the Seventeenth and early Eighteenth Centuries. See Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (1975); Horwitz, *The Transformation of American Law, 1780-1860* (1977), particularly pp. 1-10. The experience of colonial Americans was that the General Courts, which served as the principal link between the provincial governments and local communities, and which combined vast coercive powers covering criminal, administrative, and civil jurisdictions, posed too great a threat to liberty to be retained in the new republic. Accordingly, the Americans came to agree that,

> Those who "executed the Law ought not to enquire into . . . . its Reason and Policy" but ought merely "to enquire what is Law, and see that Laws are informed," for to permit courts to determine policy would introduce "a Union of Legislative and Executive Power"—"the worst Sort of Tyranny" . . . . Colonial Americans, in sum, wanted to be ruled by fixed law, not powers that could be used by potentially arbitrary rulers.
>
> Nelson, *supra*, at p. 18, quoting Josiah Quincy, "Charge to the Grand Jury," *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772* (1865).

That is, a momentous and far-reaching war was waged in and around the political institutions of post-independence America, in which the point of controversy was the extent

to which the common law of England should be "received" into our substantive and procedure law—indeed into the very framework of our judicial and political institutions. Perhaps by accident, perhaps not, the reception controversy came to a head in *United States v. Hudson & Goodwin*, 7 Cranch 32, 3 L. Ed. 259 (1812):

> The constitutional objection to common law crimes boiled down to the assertion that if the federal judiciary possessed jurisdiction to impose criminal sanctions without a statute it would be able to obliterate all constitutional limitations on the federal government. If the principle were to prevail, Thomas Jefferson wrote in 1800, "of a common law being in force in the United States" it would "possess .... the general government at once of all the powers of the State Governments and reduce .... us to a single consolidated government."
>
> Horwitz, *supra*, p. 10, quoting 7 *The Writings of Thomas Jefferson*, 451 (1892).

In *Hudson & Goodwin*, the defendants had been convicted of libeling the President and the Congress by publishing an article in a Connecticut newspaper accusing the Chief Executive and the entire membership of attempting to bribe Napoleon Bonaparte (with a two million dollar "present") to make a treaty with Spain. In upholding a demurrer to the indictment, the Supreme Court stated:

> The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases .... Although this question is brought up now for the first time to be decided by this court, we consider it as having been long settled in public opinion .... The

> only ground on which it has ever been contended that [the jurisdiction of the federal courts to define crimes or punishments] could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it . . . . But . . . . if [this argument] may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. *The legislative authority* of the Union *must first make an act a crime, affix a punishment to it,* and declare the court that shall have jurisdiction of the offense.
>
> 7 Cranch, at pp. 32-34. (Emphasis added.)

Over 100 years later, the Court of Appeals for the Second Circuit dismissed an indictment brought under a provision of the National Defense Act (chapter 53, 40 Stat. 276, August 10, 1917) which made it "unlawful" to hoard sugar or other "necessaries" which were in short supply during World War I. *Mossew v. United States,* 266 F. 18 (2nd Cir. 1920). The statute in question, however, specified no punishment, and the court, relying on *Hudson & Goodwin,* held that "By failure to provide a penalty for infraction of this statute, or to prescribe a punishment, the statute does not denounce the act as criminal." *Id.* at 22.

More recently, the Supreme Court took up the punishment dimension of federal criminal jurisdiction in a setting more similar to that presented here—that is, where Congress clearly intended to criminalize conduct and pro-

vide a penalty therefor, but, for some reason, the applicable penalty is later seen to be uncertain. In *United States v. Evans,* 333 U.S. 483 (1948), the Court upheld the dismissal of indictments brought under the Immigration Act of 1907, as amended in 1917 (34 Stat. 900, 1907, 39 Stat. 880, 1917, 8 U.S.C. Section 144). An "unusual and difficult problem in statutory construction" arose because the amendment adding "harboring and concealing" left it unclear whether the punishment (one year) and penalty ($2,000) provisions could apply to each separate act. As the Court described its dilemma:

> The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. *The problem is rather one of multiple choice,* presenting at *least three, and perhaps four, possible yet inconsistent answers* . . . .
>
> 33 U.S. at 484 (emphasis added).

After noting that "every reasonable presumption attaches to . . . ." require the courts to effectuate the Congressional purpose, the Court held that "there are limits beyond which we cannot go . . ." *Id.* Again noting *Hudson & Goodwin,* it reaffirmed the principle that where the penalty attached to proscribed conduct is uncertain, criminal jurisdiction does not lie.

Although the uncertainty of penalty in the statutory setting at issue here arises in a different manner than it did in *Evans,* the resulting problem is exactly the same: once the present classification has been invalidated, it lies beyond the power of any court to re-classify cocaine into

Schedule III, IV, or V. Consequently, since the possible penalty for any violation turns on such reclassification, the problem is *also* "one of multiple choice, presenting at least three . . . possible yet inconsistent answers. . . ." *Id.*

Finally, if one of the two prerequisites of a crime, within the meaning of the Anglo-American system of justice, is found lacking, the indictment clause of the Fifth Amendment precludes any trial on the merits, for that clause is *jurisdictional:*

> ["If an indictment is improperly amended], it is no avail . . . to say that the court still has jurisdiction of the person and the crime, for, though it has possession of the person and would have jurisdiction of the crime, if it were properly presented by an indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence." *Ex parte Bain,* 121 U.S. 1, 11 (1886)

If a valid indictment is jurisdictional, and if a plea of not guilty puts every issue in doubt, it necessarily follows that a defendant must be afforded a meaningful opportunity to challenge any essential element of the indictment brought against him. In this context, that means that petitioners have an absolute right to a ruling on the merits

of their challenge to the classification of cocaine. To deny them this right is to violate the Fifth Amendment's guarantee.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit.

Respectfully submitted,

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Appendix A

United States District Court
Eastern District of California

United States of America, Plaintiff, vs. Dennis James Pring, et al., Defendants.	CRIM. S-80-24 MLS
United States of America, Plaintiff, vs. Michael Y. Corbett, et al., Defendants.	CRIM. S-80-105 RAR
United States of America, Plaintiff, vs. Kenneth Eric Njord, et al., Defendants.	CRIM. S-80-108 LKK

[Filed March 6, 1981]

ORDER

The defendants in the above related actions have moved to dismiss the indictments pending against them alleging as a basis for their motion the failure of the Attorney

General to reclassify cocaine to a lower schedule pursuant to the Controlled Substances Act, 21 U.S.C. §§ 801, *et seq.* The defendants have also moved for an evidentiary hearing so that they may demonstrate the factual basis of their motion. In our previous Order of December 18, 1980, we found that the Government could not invoke the Single Convention Treaty to excuse the performance of any obligations imposed upon it by the Controlled Substances Act. Presently before the court are the issues of the nature of the obligations imposed upon the Attorney General by the Controlled Substances Act, whether the defendants have standing to raise the issues proffered in support of the relief sought, and what, if any, relief is appropriate at this time.

Consideration of all the issues noted above serves an important function in the final resolution of this matter. Nonetheless, we conclude that even assuming the defendants were able to prove at an evidentiary hearing that current medical knowledge indicated that cocaine is improperly classified as a Schedule II drug, and even assuming the defendants could establish that the Attorney General's failure to hold hearings regarding the reclassification of cocaine amounted to an abuse of discretion, the proper remedy would still not be a dismissal of the indictments pending against them.

In their briefs and at oral argument the defendants have consistently argued that due to the Attorney General's failure to reclassify cocaine in the face of medical evidence indicating the propriety of such action, the penalty for possession of cocaine has become uncertain and thus in-

valid.[1] It is upon this "uncertain penalty" theory that the defendants' motion for dismissal of their indictments hinges. Defendants argue that a criminal statute cannot lawfully be enforced unless the legislature has clearly defined the prohibited act and the penalty for the commission of that act. *United States v. Hudson and Goodwin,* 11 U.S. (7 Cranch) 32, 3 L.ed. 259 (1812); *see also United States v. Evans,* 333 U.S. 483 (1948); *United States v. Grimaud,* 220 U.S. 506 (1911). This is clearly a correct statement of the law. However, neither the application of the cases cited above, nor any others cited by the defendants, would require the court to conclude that the penalties in question here are uncertain and thus unlawful. Because we find the penalties imposed by the Controlled Substances Act to be certain at this time, the defendants' Motion to Dismiss the Indictments must be denied.

The defendants place particular emphasis upon *United States v. Evans, supra,* arguing that its application to the circumstances here would require dismissal of the indictments. The defendants' reliance is misplaced. In *Evans* the prosecution of the defendant was based upon a statute which prohibited both illegal entry into the country by

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[1]Under the Controlled Substances Act the penalty for manufacturing, distributing, or dispensing a controlled substance is directly linked to the schedule in which the particular substance has been placed and whether it has been defined as a narcotic drug. 21 U.S.C. § 841(b). Thus, defendants argue, the improper scheduling of a substance necessarily results in an uncertain penalty for its manufacture, distribution or dispensing.

aliens and the harboring of aliens who had entered the country illegally. In enacting the statute, however, Congress provided a penalty only for illegal entry and not for the act of harboring. The Supreme Court held that in this context no defendant could be prosecuted for the act of harboring under the statute. This holding was premised upon the fact that Congress simply had not provided a penalty for the prohibited act and that it was beyond the power of the court to infer a penalty, for to do so would be a usurpation of a legislative function. Certainly *Evans* stands for the proposition that in order to be lawful a criminal statute must clearly define the act forbidden and the express penalty, but it does not compel dismissal in these cases. In *Evans* there was a complete absence of a penalty for the prohibited act. The present cases present no such disability. Congress has manifested its clear intent to make possession and distribution of cocaine a crime (21 U.S.C. §§ 841, 844), and more to the point here, Congress has expressly set forth the penalties applicable to the prohibited acts. 21 U.S.C. § 841(b).[2] Moreover, *Evans*

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[2]The original classification of cocaine by Congress, upon which the penalty provision is fixed, has been upheld by every court considering the question and is not challenged by the defendants here. *See United States v. Lustig*, 555 F.2d 737, 750 (9th Cir. 1977) *cert. denied*, 434 U.S. 926 (1977); *United States v. Harper*, 530 F.2d 828 (9th Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *United States v. Wheaton*, 557 F.2d 275 (1st Cir. 1977); *United States v. McCormick*, 565 F.2d 286 (4th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978); *United States v. Solow*, 574 F.2d 1318 (5th Cir. 1978); *United States v. Szycher*, 585 F.2d 443 (10th Cir. 1978); *United States v. Vila*, 599 F.2d 21 (2d Cir. 1979), *cert .denied*, 444 U.S. 837 (1979); *United States v. Stieren*, 608 F.2d 1135 (8th Cir. 1979); *United States v. Foundas*, 610 F.2d 298 (5th Cir. 1980).

itself suggests that where Congress has attempted to prescribe a penalty for a prohibited act, the courts should make every effort to interpret the statute so as to give effect to Congressional intent.[3] We need look no further than the penalty provision of the Controlled Substances Act in order to find Congressional intent. *See* 21 U.S.C. § 841.

The defendants also argue that the penalty for committing a prohibited act must be made certain by the legislative act and that the burden of fixing punishment may not be shifted to the administrative agency,[4] citing *United States v. Grimaud, supra.* In *Grimaud* the Court upheld a statute making it a crime to violate the regulations enacted by the Secretary of Agriculture. The statute in question

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[3]In *Evans* the Court indicated that only under rare circumstances should a court find a criminal penalty uncertain so as to require dismissal of an indictment when it noted,

> "Even in criminal matters a strong case would be required to bring about the result appellee seeks. For, where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the court to make it effective in accord with the evident purpose. This is as true of penalty provisions as it is of others." 333 U.S. at 486.

[4]The Congressional delegation of authority to the Attorney General to classify controlled substances as enacted in the Controlled Substances Act has been uniformly upheld as a constitutional delegation and is not challenged by the defendants in these proceedings. *See United States v. Barron,* 594 F.2d 1345 (10th Cir. 1979), *cert. denied,* 441 U.S. 951 (1979); *United States v. Roya,* 574 F.2d 386 (7th Cir. 1978), *cert. denied,* 439 U.S. 857 (1979); *United States v. Davis,* 564 F.2d 340 (9th Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978); *United States v. Pastor,* 557 F.2d 930 (2d Cir. 1977); *United States v. Porter,* 544 F.2d 936 (8th Cir. 1976).

fixed the penalty for any violation of the regulations adopted by the the Secretary. The Court reversed the dismissal of the indictments in question finding that the particular regulation was properly adopted under the statute. Thus, *Grimaud* fails to support the position of the instant defendants.

Finally, the defendants argue that *United States v. Batchelder*, 442 U.S. 114 (1979), represents a recent recognition by the Supreme Court that the uncertainty of criminal penalties and their effect on the constitutionality of criminal statutes is a problem which "remains a contemporary one." We acknowledge the truth of this very general observation but observe that the holding in *Batchelder* provides no support for the defendants' motion. *Batchelder* considered the effect of duplicative criminal laws enacted by Congress. Both statutes in question prohibited the same act, the receiving of firearms by a person previously convicted of a felony, but provided different penalties for the commission of the act. The Supreme Court held that the discretion necessarily vested in the prosecutor by such dual legislation was not unconstitutional so long as suspect distinctions were not employed in deciding which statute to prosecute under. The Court reasoned that this exercise of discretion by the prosecutor did not create an uncertain penalty for the commission of the prohibited act because,

> The provisions in issue here . . . unambiguously specify the activity proscribed and the penalties available upon conviction. . . . That this particular conduct may violate both Titles does not detract from the notice afforded by each. Although the statutes create uncertainty as to which crime may be charged and

> therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.

442 U.S. at 123. Here, as in *Batchelder*, the statute(s) at issue clearly defines the conduct prohibited and the punishment authorized, thus making the defendants' uncertain penalty argument unpersuasive. In fact, the penalty is even more certain in this case since Congress has enacted only one penalty.

In enacting criminal statutes, Congress is required to clearly define the prohibited act and the concurrent penalty. The cases discussed above also establish that this requirement of a certain penalty serves three distinct functions in that it must give notice to the defendant, limit the discretion of the executive, and inform the courts as to the permissible punishment terms available. *United States v. Batchelder*, 442 U.S. at 126. All three of these functions have been served by the provisions of the Controlled Substances Act.

As discussed above, the Controlled Substances Act clearly defines in certain terms the penalties for the possession and distribution of cocaine. Thus the Act provides anyone who engages in the prohibited conduct with notice of the possible consequences of his acts. A colorable argument that cocaine may be classified improperly does not deprive one of fair notice of the risks involved in the activity. Moreover, to the extent that the discretion of the

executive branch in prosecuting prohibited conduct must be limited (*see United States v. Batchelder, supra*), that discretion is limited by the penalty provision of the Controlled Substances Act.[5]

In the same way that the Controlled Substances Act provides adequate notice to defendants and prosecutors, it also clearly defines the prohibited conduct and the applicable penalties so as to limit judicial discretion. In this context, however, the defendants may be understood to argue that the penalty provisions which the court would apply here are unlawful due to the Attorney General's refusal to proceed with reclassificaton hearings. It is at this point that the issue of exhaustion of administrative remedies arises. In effect, the defendants ask this court to review the inaction of the Attorney General as demonstrated by his failure to hold hearings regarding the reclassification of cocaine. The defendants argue that they should not be required to exhaust the administrative remedies provided by the Drug Enforcement Agency because such an act would be futile given the agency's previous position on the issue and because the application of the exhaustion doctrine in criminal cases is disfavored.[6] Assuming this

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[5]The maximum penalty allowed for possession of cocaine with the intent to distribute is defined by the Act as 15 years imprisonment and a $25,000 fine. 21 U.S.C. § 841(b)(1).

[6]The Supreme Court has held that because application of the exhaustion doctrine in criminal cases may lead to an exceedingly harsh result, sometimes stripping the defendant of his only defense, it should be applied in criminal cases only where a compelling government interest requires it. *McKart v. United States*, 395 U.S. 185 (1969). Requiring the exhaustion of administrative remedies by a criminal defendant is wholly inappropriate where the statute does not put the defendant on notice that failure to pursue the

court adopted the position of the defendants with regard to exhaustion it still would not bring the review of the Attorney General's action or inaction within the jurisdiction of this court. A waiver of the requirement of exhaustion of administrative remedies excuses one from participation in the administrative process and allows one to proceed directly to the otherwise available judicial body. In the case of the Controlled Substances Act Congress has expressly restricted review of the Attorney General's actions, and thus inaction, to the United States Court of Appeals for the District of Columbia or the circuit in which the principal place of business of the person aggrieved is located. 21 U.S.C. § 877,[7] *see also NORML v.*

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administrative remedy might result in the forfeiture of a defense in an enforcement proceeding. *Moore v. City of East Cleveland*, 431 U.S. 494, 497, n.5 (1977). Another recognized exception to the exhaustion doctrine is that one may not be required to exhaust available administrative remedies where to do so would be futile. This exception has been applied in the context of the Controlled Substances Act where the Attorney General had adopted an agency position that would require the rejection of the petitioning party's claim. *United States v. Kiffer*, 477 F.2d 349, 351 (2d Cir. 1973), *cert. denied*, 414 U.S. 831 (1973). The defendants in this case make a similar futility argument.

[7]In 21 U.S.C. § 877 Congress provided as follows:

> Judicial review. All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

Bell, 488 F.Supp. 123, 141, n. 43 (D.D.C. 1980). Thus, assuming exhaustion of administrative remedies is not required of the defendants their proper course would be to seek an original writ of mandate in either the United States Court of Appeals for the District of Columbia or in the Ninth Circuit.

Because the Controlled Substances Act clearly sets forth the penalties for violation of the prohibited acts in question in a manner sufficient to notify the court of the applicable penalties, the prosecution of these defendants is not barred. The defendants must seek review of the Attorney General's inaction in the appropriate Courts of Appeals.[8] If any of the defendants are convicted of the charges pending against them and it is later established by the Courts of Appeals or through their writ of mandate by the Attorney General, that any sentence imposed in these proceedings was unlawful due to the misclassification of cocaine, then the ag-

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[8]This resolution has given us some pause. We frankly acknowledge that it has some appearance of a judicial version of a bureaucratic run-a-round. Nonetheless, we observe that Congress may well have placed review of administrative action in the Court of Appeals so as to preclude such issues being raised in a criminal proceeding. Whether such was the legislative intent or not, the effect of the allocation of review jurisdiction appears to be to preclude the issue from the criminal trial.

grieved defendant would have an available remedy by attacking his sentence pursuant to the federal habeas corpus statutes. 28 U.S.C. §§ 2255, 2241.[9]

For the reasons noted above, it is this court's conclusion that even were the defendants to prevail on each of their substantive arguments the dismissal of the indictments against them would not be the appropriate remedy. It is therefore ordered that the defendants' Motion to Dismiss

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[9]Throughout these proceedings the defendants have taken the position that it is beyond the jurisdiction of this court to decide to which schedule of the Controlled Substances Act cocaine should be removed. Rather, the defendants have argued, the court may only determine the classification in which cocaine may not be placed. *See* Defendant Pring's Further Supplemental Brief in Support of Motion to Dismiss of December 29, 1980, at pp. 4 and 16; Defendant Pring's Reply to Government's Final Brief of February 11, 1981, at p. 14. Inherent in this position is the assumption that cocaine, although it may be properly the subject of reclassification, would remain a controlled substance within one of the five schedules established by the Controlled Substances Act. 21 U.S.C. § 812. Moreover, although the defendants offer to prove that cocaine is a relatively harmless drug the use of which does not lead to psychosis or psychological dependency (Defendants' Offer of Proof in Support of Motion to Dismiss Indictment of September 16, 1980, at paragraphs 56, 63 and 67), they also offer to prove that cocaine is a drug which acts as a stimulant and is within the same family of drugs as amphetamines. (Offer of Proof at paragraph 33). In general amphetamines, having a stimulating effect on the central nervous system, are classified as Schedule III drugs under the Controlled Substances Act. 21 U.S.C. § 812(c). Given these facts it is doubtful that cocaine could be completely removed from the schedules so as to make its possession and distribution lawful even if hearings were held by the Attorney General, absent an Act of Congress to that effect.

Indictments and for an Evidentiary Hearing on the Misclassification of Cocaine is hereby denied.

IT IS SO ORDERED.
DATED: March 5, 1981.

/s/ MILTON L. SCHWARTZ
Milton L. Schwartz
U.S. District Judge

/s/ RAUL A. RAMIREZ
Raul A. Ramirez
U.S. District Judge

/s/ LAWRENCE K. KARLTON
Lawrence K. Karlton
U.S. District Judge

Appendix B

United States District Court
Eastern District of California

United States of America, Plaintiff, vs. Dennis James Pring, et al., Defendants.	NO. CRIM. S-80-24 MLS
United States of America, Plaintiff, vs. Michael Y. Corbett, et al., Defendants.	NO. CRIM. S-80-105 RAR
United States of America, Plaintiff, vs. George Gene Goorabian, et al., Defendants.	NO. CRIM. S-80-108 LKK

[Filed April 24, 1981]

ORDER

In this court's Order of March 5, 1981, the defendants' motions to dismiss indictments and for evidentiary hearings on the alleged misclassification of cocaine were denied. The defendants in the above related actions have now

moved for reconsideration, specifically reconsideration of that portion of the Order which found that the Attorney General's refusal to reclassify cocaine was a final agency action[1] reviewable only in the appropriate court of appeals pursuant to 21 U.S.C. § 877.

In their motions to reconsider, the defendants argue that the March 5, 1981, Order effectively prohibits them from presenting a defense in their criminal prosecution and thus violates their rights under the Fifth and Sixth Amendments. The defense that the defendants propose to present is that although they have been charged with possession with the intent to distribute cocaine, a Schedule II drug, cocaine may no longer *lawfully* be classified as a Schedule II drug and thus their indictments must be dismissed. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). The argument that to prevent the defendants from raising this defense at trial raises significant constitutional questions would be persuasive if the defendants had offered to prove that in light of current medical and scientific knowledge the only lawful course of conduct available to the Attorney General was to reclassify cocaine. Significantly, the defendants do not, and cannot, offer to present such proof.

The defendants would certainly prefer that the classification of drugs under the Controlled Substances Act

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[1]Congress provided that all final determinations, findings and conclusions of the Attorney General under the Controlled Substances Act (CSA) were reviewable only in the appropriate court of appeals. 21 U.S.C. § 877. In this case the Attorney General's refusal to reclassify was, in effect, his "last word on the matter" and thus constituted a final action for the purposes of review. *See Harrison v. PPG Industries, Inc.*, ... U.S. ....., 64 L.Ed.2d 525, 534 (1980).

(CSA) be determined solely by medical and scientific criteria; however, such is not the case. An examination of the CSA reveals that the classification of drugs is based in significant part upon a variety of policy determinations and not upon precise scientific data. Particularly relevant in this regard are the findings required by Congress for the placement of drugs in each of the schedules. 21 U.S.C. § 812. For instance, the placement of a drug in Schedule II requires a finding that it have a "high potential for abuse." Schedule III is identified as the proper placement for drugs which are found to have a "potential for abuse less" than those substances placed in Schedules I and II.[2] The use of non-medical terminology and comparisons such as "less than" demonstrates that the schedules are not distinguished by precise medical determinations. This conclusion is bolstered by the fact that Congress anticipated that findings of "a potential for abuse" would be based upon non-medical factors such as whether there was a significant diversion of the drug in question from legitimate drug channels or whether individuals were taking the drug on their own initiative rather than on the basis of medical advice. 1970 U.S. Code Congressional and Administrative News at 4601; House Report No. 91-1444.

The cursory examination of the CSA undertaken above clearly reveals that control decisions, including the scheduling of drugs, were not intended to be based solely on medical and scientific determinations but also to a sig-

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[2]Similarly, placement in Schedule IV requires a finding that the drug be found to have a "low" potential for abuse relative to the drugs in Schedule III. Schedule V is described as the proper placement for drugs found to have a "low" potential for abuse relative to the drugs found in Schedule IV. 21 U.S.C. § 812.

nificant extent upon social policy and law enforcement criteria[3]. This intent that the Attorney General balance the various factors was specifically recognized by Congress. 1970 U.S. Congressional and Administrative News at 4589.

The analyis set forth above leads this court to conclude that the defendants, through their offer of proof of current medical knowledge, are unable to establish that cocaine cannot lawfully be classified as a Schedule II drug. At most the defendants might be able to prove that cocaine could be placed in a different schedule. This conclusion is of significant consequence. Unlike *Yakus v. United States*, 321 U.S. 414, 431 (1943), this court's Order of March 5, 1981, does not preclude the defendants from attacking the statutory provision which they are charged with violating. Rather, because the classification of controlled substances is governed both by policy and medical determinations, the defendants in this case are simply unable to prove that, *as a matter of law,* cocaine is improperly classified.

The fact that the classification of cocaine is not based solely upon medical and scientific determinations divests the issues presented by the defendants' motions to reconsider of their constitutional relevancy. That is, requiring the defendants to present their argument (that cocaine *could* be reclassified due to recently obtained medical evidence) to the appropriate court of appeals does not preclude them from presenting a defense to the criminal charges pending against them. Rather, the issue of current medical knowledge and its effect upon the classification of

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[3]*See also* 1970 U.S. Congressional and Administrative News at p. 4603 (indicating that the history and pattern of abuse of a drug including the social, economic, and ecological characteristics of the segments of the population involved in such abuse was a factor to be considered in determining in which schedule a drug should be placed).

cocaine is solely an administrative law issue and does not constitute a defense in a criminal prosecution given the various non-medical factors that are to be considered in the classification process. In essence then, the court finds that the proffered evidence is simply irrelevant to the issues tendered by this case.

Thus, the March 5, 1981, Order, contrary to the defendants' assertions, does not raise the issue of the constitutionality of a legislative provision precluding a criminal defendant from presenting a defense at trial on the ground that exclusive jurisdiction for review of administrative actions lies in the court of appeals. That constitutional question is avoided insofar as the issue posed by the defendants; whether the Attorney General's refusal to reclassify cocaine is arbitrary, is properly directed to the appropriate court of appeals in the form of a motion for a writ of mandate. See March 5, 1981, Order at pp. 7-9.

For the reasons set forth above, the defendants' Motion for Reconsideration is hereby denied.

IT IS SO ORDERED.

DATED: April 23, 1981.

/s/ MILTON L. SCHWARTZ
Milton L. Schwartz
U.S. District Judge
/s/ RAUL A. RAMIREZ
Raul A. Ramirez
U.S. District Judge
/s/ LAWRENCE K. KARLTON
Lawrence K. Karlton
U.S. District Judge

Appendix C

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. DC# 80-24-MLS: Dennis James Pring; Robert Thomas Rouch; Paul Harford Hibbert; DC# 80-105-RAR: Michael Y. Corbett; Rodney Duane Jackson; Theresa Maye Williams; Valerie Elizabeth Arrington; and DC# 80-108-LKK: Scott Thomas Gudmundson, Defendants-Appellants.	No. 81-1301 DC# CR-80-24-6/2/4 MLS CR-80-105-1/2/3/4/5 RAR CR-80-108-4 LKK Eastern California (Sacramento)

[Filed Nov. 10, 1981]

ORDER

Before: WRIGHT, CHOY, and ANDERSON,
Circuit Judges

The memorandum in opposition to appellee's motion to dismiss, received October 28, 1981, is ordered filed.

Appellee's motion of October 6, 1981 for dismissal of this appeal for lack of jurisdiction is granted. This appeal is dismissed. 28 U.S.C. § 1291; *Abney v. United States*, 431 U.S. 651 (1977). The mandate will issue forthwith.

Appendix D

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. DC# 80-24-MLS: Dennis James Pring (def 6); Robert Thomas Rouch (def 4); Paul Harford Hibbert (def 2); DC# 80-105-RAR: Michael Y. Corbett (def 1); Rodney Duane Jackson (def 2); Theresa Maye Williams (def 3); Valerie Elizabeth Arrington (def 4); Royal Edwards Watkins (def 5); and DC# 80-108-LKK: Scott Thomas Gudmundson (def 4), Defendants-Appellants.	No. 81-1301 DC# CR 80-24-6-2, etc. MLS Eastern California (Sacramento)

[Filed Dec. 4, 1981]

ORDER

Before: WRIGHT and CHOY, Circuit Judges

The court's order of November 10, 1981 is amended to add the following: the alternative petition for writ of mandamus is denied.

Appendix E

§ 811. Authority and criteria for classification of substances —Rules and regulations of Attorney General; hearing

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed;

or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

Evaluation of drugs and other substances

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation of recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

Factors determinative of control or removal from schedules

(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances

(d)(1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this

title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health, Education, and Welfare who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health, Education, and Welfare shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall

transmit timely notice to the Secretary of Health, Education, and Welfare of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health, Education, and Welfare shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United Sates in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetics Act do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health, Education, and Welfare, after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetics Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health, Education, and

Welfare nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health, Education, and Welfare concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health, Education, and Welfare does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall—

(i) if he deems that additional controls are necessary to protect the public health and safety, recommend to the Attorney General that he institute proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

(ii) request the Secretary of State to transmit a notice of qualified acceptance, with the period specified in the Convention, pursuant to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of

the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or

(iv) in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)(A) If the Attorney General determines, after consultation with the Secretary of Health, Education, and Welfare, that proceedings initiated under recommendations made under paragraph (B) or (C)(1) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State

to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings.

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health, Education, and Welfare and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry ou the United States obligations under paragraph 7

of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)—

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention.

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention.

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 312(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health, Education, and Wel-

fare or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information.

Immediate precursors

(e) The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

Abuse potential

(f) If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

Non-narcotic substances sold over the counter without a prescription: dextromethorphan

(g)(1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic

Act, be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after the date of such enactment pursuant to the foregoing provisions of this section.

§ 812. Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

§ 841. Prohibited acts A—Unlawful acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000,

or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person, shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000,

or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(e)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or subchapter III of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Piperidine offenses and penalty

(d) Any person who knowingly or intentionally—

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000 or both.

§ 877. Judicial review

All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.